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FOCUS ON DISCRETIONARY POWERS

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Classified By: Ambassador for reasons 1.4(a,b,d).

11. (SBU) Summary. The Constitutional Court's hearings on Yushchenko's April 2 decree went more smoothly April 19 than the previous day, as Presidential Court representative Shapoval concluded his presentation and fielded questions. Shapoval, a former Constitutional Court judge and one of Ukraine's leading constitutional experts, argued that Yushchenko legitimately used his discretionary powers in the absence of the Court's interpretation of official presidential duties and powers to issue the decree. Opposition leaders Tymoshenko, Lutsenko, and Kyrylenko held another joint press conference late April 18 to continue their criticism of the Court proceedings, to announce a new rally for April 20 on European Square, and to preview a gambit to give Yushchenko another rationale to dissolve the Rada by dropping membership below the required 300 MP quorum. Under the plan, BYuT and OU MPs would resign from their factions, allowing bloc leadership to expel them; combined with official cancellation of their 2006 electoral lists, which would prevent the Central Election Commission (CEC) from replacing the MPs, the maneuver could deprive the Rada of a legal quorum. (Note: This follows opposition MPs trying to block judges from the courthouse to prevent a CC quorum and the coalition-organized "sick-out" at the CEC to prevent a quorum there. End note.) An emergency Our Ukraine bloc interparty congress April 19 took steps to implement the novel resignation strategy. The press secretary for PM Yanukovich, in Warsaw April 19, announced that there would be additional consultations April 20 between Yanukovich and Yushchenko to seek compromise.

12. (C) Comment. One of the weaknesses of the current court, retired constitutional court judge Martynenko has told us, is the lack of expertise in Constitutional, rather than civilian/criminal, law. Shapoval, who sat on the court when it previously interpreted presidential power in 1997, 2000, and 2003, maintained in his presentation that the Court had a duty to conduct a constitutional debate, since the stakes in the case affected the nature of the institution of the Presidency in Ukraine, not just whether there were violations in the April 2 decree. However, some of the judges, particularly Kuchma appointees Pshenychnyi and Stanik, have bristled at Shapoval's extended discourse on discretionary powers and relevant constitutional provisions. Shapoval also announced that he would relinquish responsibilities as the President's representative on the Court once the Court decided in the current case; as a respected constitutional expert, he may well feel uncomfortable mixing constitutional theory with political arguments. End summary.

13. (SBU) While an estimated 15,000 protesters gathered outside the courthouse on April 19, with opposition supporters outnumbering coalition supporters two:one, the police were better prepared to keep the peace. Justices, media, and observers gained access to the court, and none of the previous day's pushing antics reoccurred. Inside the building, presidential representative Shapoval finished his presentation and took questions from the judges. A former Constitutional Court judge (and deputy Chair) who served from 1996-2005, Shapoval focused on a fundamental principle of constitutional law, discretionary powers. (Embassy Note: This concept does not exist in civil/criminal law as practiced in Ukraine. End Note) Shapoval reiterated his main argument from April 18 (reftel) by stating that the President had the full authority to act as the guarantor of the Constitution using discretionary powers to issue the decree in the absence of Court interpretation of presidential powers and duties. Shapoval will continue to take questions from judges the morning on April 20.

Opposition Continues to Push: New Rationale?

14. (SBU) Late on April 18, Tymoshenko, Kyrylenko, and Lutsenko held another joint press conference to criticize the alleged use of police force in allowing "corrupt" judges access to the court earlier, as well as the overall lack of quality of the court proceedings. They called for an opposition rally on April 20 at 6 pm in European Square. Regions MP Vladyslav Lukyanov told us that the coalition was now planning a counter-rally in the Maidan, boasting that we would then see who had the bigger turnout and therefore, who was the most popular political force in the country.

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15. (SBU) Tymoshenko and Kyrylenko also previewed a new rationale to bolster Yushchenko's argument that the Rada should be considered dissolved. BYuT and OU MPs would offer their resignations en masse, not directly from the Rada, but from their factions; combined with moves to annul the BYuT and OU electoral lists submitted to the CEC for the 2006 election, this could officially deprive the Rada of the required 300 MP quorum. OU staffer Svetlana Gumenyuk told us April 19 that the plan was intended to sidestep the Constitutional provisions in Article 81.2 that mandate Rada approval of a deputy's resignation from the Rada itself by having the two factions take advantage of the provisions in Article 81.6, which states that if an MP resigns from his faction, the respective party/bloc that controls the factions can expel that MP.

16. (SBU) Normally, candidates from lower on the list maintained at the CEC would fill the slot, but if the lists are annulled in their entirety, replacement would not be possible. The OU Bloc's interparty congress April 19 decided to: abolish its 2006 electoral list; expel Minister of Economy Kinakh's Party of Industrialists and Entrepreneurs from the OU bloc; terminate the Rada powers of the OU MPs who had defected to the coalition; and take further action on other OU MPs once the CEC abolished the OU electoral ticket. Yuliya Tymoshenko's bloc held a parallel congress which also decided to terminate the 2006 electoral ticket, expel 17 MPs who had cooperated with the coalition majority, and submit resignation letters. Tymoshenko later told the press that 104 of the 129 BYuT MPs elected in March 2006 had submitted their letters of resignation to President Yushchenko, suggesting that 25 MPs refused to participate in the maneuver.

Public Polls - low confidence in the Court?

17. (SBU) The controversies around the Court may be affecting public perceptions of the Court. An April 9-13 poll conducted by the Kyiv International Institute of Sociology (KIIS) indicated that only 15 percent believed the Court could rule independently, compared to 35.6 percent of respondents who believed the CC could not make an independent decision. An earlier KIIS poll conducted March 29-April 3 suggested that 50 percent of respondents did not believe the Court could make objective and unbiased decisions. (Embassy Note: Although this polling organization was found to have falsified polling results in then-candidate Yanukovych's favor in the 2004 election, we believe that these results accurately reflect the public's doubts about the ability of Ukrainian judges to rule independently. End Note.)

18. (U) Visit Embassy Kyiv's classified website:
www.state.sgov.gov/p/eur/kiev.
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